

a

TAN LIAN HUAT

v.

JUAN KUANG HOLDINGS SDN BHD & REDUCED

b

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[COMPANIES WINDING-UP NO: 28-38-1998]
1 APRIL 1999

c

COMPANY LAW: *Winding-up - Injunction to restrain advertisement of petition - Whether respondent company entitled to restraining order pending disposal of suit against petitioner*

d

This was an application by the respondent company ('the respondent') to restrain the advertisement of the winding-up petition against it until its civil suit against the petitioner in the High Court was heard.

e

The respondent had loaned RM2 million to two friends of the petitioner, *ie*, OCS and OCM, on the advice of the petitioner. The petitioner had shares in the respondent. When the petitioner sold some of these shares, the respondent decided to retain the proceeds of the sale of the said shares until OCS and OCM settled the loan. OCS and OCM had yet to settle the loan and the time stipulated for repayment had passed.

f

The respondent claimed that it was not a debtor to the petitioner but a stakeholder of the shares concerned. Thus, that entitled it to retain the balance of the money from the sale of the said shares until the loan was settled. Also that the petitioner had guaranteed the repayment of the loan at the respondent's fifth AGM.

g

Against this, the petitioner claimed that the proceeds of the sale of the said shares could not be used to set-off the loan granted.

Held:*h*

[1] A stakeholder is one who has received money for the express purpose of holding it until it has been ascertained who is entitled to it. The respondent raised the issue of it being a stakeholder in the civil suit filed in the High Court wherein the petitioner was cited as the defendant. Also the respondent converted the set-off as one of the prayers in that civil suit which was perfectly in order. Until the suit was heard and disposed off, the petitioner should be restrained from taking steps to wind-up the respondent.

i

[2] After the petitioner gave an undertaking and guaranteed the repayment of the loan at the fifth AGM of the respondent's company, the petitioner had

reneged on his words to save his own skin. As a surety or as a guarantor, the petitioner's liability arose upon default of the principal debtors, ie, OCS and OCM. a

[3] The respondent succeeded in establishing that the debt claimed by the petitioner was disputed on substantial grounds. b

[Application allowed.]

Case(s) referred to:

- Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1 (*refd*)
- Barry v. Roberts* [1835] 1 Har (*refd*)
- Beddall v. Maitland* [1881] 17 Ch D 174 (*refd*) c
- Bock v. Gorrisen* [1860] 2 De GF (*refd*)
- Brenes & Co v. Downie* [1914] SC 97 (*refd*)
- Brown v. I.R.C* [1965] AC 244 (*refd*)
- Burdick v. Garrick* [1870] LR 5 Ch App 233 (*refd*)
- Carreras Rothmans Ltd v. Freeman Matthews Treasure Ltd* [1985] Ch 207 (*refd*) d
- Cowling v. Beachum* [1823] 7 Moore CP 465 (*refd*)
- Dooby v. Watson* [1888] 39 Ch D 178 (*refd*)
- ex parte Dale & Co* [1879] 11 Ch D 772 (*refd*)
- Flitcroft's case* [1882] 21 Ch D 519 (*refd*)
- Fraser v. Equitorial Shipping Co Ltd (The Ijaola)* [1977] 1 Lloyd's Rep 103 (*refd*)
- General Communications Ltd v. Development Finance Corp. of New Zealand* [1990] 3 NZLR 406 (*refd*) e
- Gladstone v. Birley* [1817] 2 Mer 401 (*refd*)
- Halesowen Presswork and Assemblies Ltd v. Westminster Bank Ltd* [1971] 1 QB 1 (*refd*)
- Hammonds v. Barclay* [1802] 2 East 227 (*refd*)
- Hancock v. Smith* [1889] 41 Ch D 456 (*refd*) f
- Houghton v. Matthews* [1803] 3 B 7 P 485 (*refd*)
- Kirkham v. Peel* [1880] 43 LT 171 (*refd*)
- Littlewood v. Williams* [1815] 6 Taunt 277 (*refd*)
- Mathew v. Brise* [1851] 14 Beav 341 (*refd*)
- Miles v. New Zealand Alford Estate Company* [1886] 32 Ch D 266 (*refd*)
- Moschi v. Lep Air Services Ltd And Others* [1972] 2 WLR 1175 (*refd*) g
- New Zealand and Australian Land Co v. Watson* [1881] 7 QB 374 (*refd*)
- North American Land and Timber Co Ltd v. Watkins* [1904] 2 Ch 233 (*refd*)
- Osman bin Abdul Ghani & Ors v. United Asian Bank Bhd* [1987] 1 MLJ 27 (*refd*)
- Palette Shoes Pty Ltd v. Krohn* [1937] 58 CLR 1 (*refd*)
- Pearson v. Scott* [1878] 9 Ch D 102 (*refd*) h
- R v. South Devon Ry Co* [1850] 15 QB 1043 (*refd*)
- Rawson v. Samuel* [1839] 1 Cr & Ph 161 (*refd*)
- Re Arthur Wheeler & Co* [1933] 102 LJ CH 341 (*refd*)
- Re Kayford* [1975] 1 WLR 279 (*refd*)
- Re Parker, ex parte Froggatt* [1843] 3 Mont D (*refd*)
- Re Strachan, ex parte Cooke* [1876] 4 Ch D 123 (*refd*) i
- Re Wreford, Carmichael v. Rudkin* [1897] 13 TLR 153 (*refd*)
- Ridgway v. Ley* [1856] 25 LJ Ch 584 (*refd*)

- a* *Potters (A Firm) v. Loppert* [1973] Ch 399 (*refd*)
Rushforth v. Hadfield [1805] 6 East 519 (*refd*)
Sadler v. Smith [1869] LR 5 QB 40 (*refd*)
Smart v. Sandars [1848] 5 CB 895 (*refd*)
System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd [1999] 1 AMR 1187 (*refd*)
- b* *Walker v. Corboy* [1990] 9 NSWLR 382 (*refd*)
Westpac Banking Corp v. Savin [1985] 2 NZLR 41 (*refd*)
Woodworth v. Conroy [1976] QB 884 (*refd*)

Legislation referred to:

- Companies Act 1965, s. 218
- c* Contracts Act 1950, ss. 79, 135, 138, 170, 171, 174
Rules of the High Court 1980, O. 15 r. 2
- For the petitioner* - Goh Mey Foon; M/s Leng & Co
For the respondent - Loo Wei Kheng; M/s Lam & Lim
- d* Reported by Usha Thiagarajah

JUDGMENT**Abdul Malik Ishak J:***e* **Enclosure 6**

- This was an application by the respondent (Juan Kuang Holdings Sdn Bhd and Reduced) by way of a summons in chambers in encl. 6 prayer (1) thereto to restrain the petitioner (Tan Lian Huat), his agent or his servant from advertising in the local newspaper and by way of a gazette notification the winding up of the respondent until the respondent's writ of summons *vide* civil suit no: 22-178-1998 filed before the Johor Bahru High Court no: 3 be heard. By prayer (2) to encl. 6 the respondent sought for costs in the cause and, by prayer (3) to encl. 6 the respondent sought for any other relief as the court deems fit and suitable.
- f*
- g* Enclosure 6 was supported by an affidavit in encl. 5 of Lee Poo Sik ("Lee") that was affirmed on 25 May 1998 and filed on the same day. Lee deposed the affidavit in encl. 5 in his capacity as the director of the respondent and he adverted to encl. 6 and the statement of claim filed in relation to civil suit no: 22-178-1998 when deposing the affidavit in question. The respondent was,
- h* at all material times, a company with a registered office at room 503, 5th Floor, Merlin Tower, Jalan Meldrum, 80000 Johor Bahru, Johore. The petitioner was said to be an ex-director and shareholder of the respondent and had an address for service at no: 16, Jalan Rengas, Melodies Garden, 80250, Johor Bahru, Johore. The petitioner too was described as one of the directors
- i* and held three ordinary shares valued at RM1 each (0.001%) from the paid up capital of RM300,005 in the company known as Oh Juan Hing Sesame

C

$$e$$
 f

g

h

i

- a* 1996 on condition that the loan must be repaid to the respondent six months from the date of the loan, and that would be on or before 30 April 1997. Lee too deposed that to his knowledge, from the records of the Hong Kong bank the recipient of the RM2 million was none other than the petitioner. Lee categorically deposed that both OCS and OCM had failed and/or refused to
- b* reimburse the RM2 million loan even though the respondent repeatedly requested for its return. According to the respondent's records extracted from the yearly meetings, on 27 July 1997 the petitioner gave an undertaking and guaranteed to repay the RM2 million loan to the respondent as the petitioner had recommended that loan in the first place. It was deposed by Lee that the
- c* petitioner, in the yearly meeting, had sought to justify his actions by imposing an interest of 1% every month on that RM2 million as it was comparatively better than the rates determined by the banks for its fixed deposits and Lee verily believed that both OCS and OCM had agreed to that proposed rate of interest. Lee further deposed that to his knowledge at the yearly meeting, the
- d* chairman of the meeting by the name of Lee Sing Kuan had questioned the petitioner in regard to the interest as suggested by the petitioner that was leviable on the RM2 million loan as the petitioner did not obtain the prior approval of the respondent's board of directors in regard to the same. The minutes of the fifth AGM of the respondent dated 27 July 1997 makes for interesting reading. It was worded as follows (the relevant parts only):
- e* Dr. Ng Eng Hong then queried as to who was Oh Chin San and in what way he was related to the Company. Tan Lian Huat replied that Oh Chin San is a shareholder of Juan Kuang Pte Ltd (S'pore) and that he has borrowed RM2 Million from the Company bearing interest at 12% per annum - 1% per month. The 2 Million was supposedly to have been paid back within 6 months of the
- f* loan, however it had now dragged on and Mr. Oh has promised to pay back within 2 months. Dr. Ng Eng Hong then inquired whether there was any collateral for the loan. Mr. Tan Lian Huat replied that there was Mr. Oh's personal guarantee which was worth more than the loan. Mr. Tan Lian Huat confirmed his guarantee for the loan as had been informed at the last Board meeting and if this was not enough his family will guarantee for the RM2
- g* Million because Mr. Oh had a very big piece of land in Johor Bahru but to arrange security would incur legal fees and other expenses for a loan of 6 months it was not worth going through the hassle. Mr. Lee Sing Kuan has been harping on the loan and it has gone through the Board. Mr. Tan Lian Huat justified the loan in that if the money has been placed in the Bank it
- h* would earn quite a good rate of interest say 7.2% but if the Company can secure it in the sense that Mr. Oh personally guaranteed for it (Mr. Tan Lian Huat did not think he would run away) and if the Company was still not satisfied, he was prepared to personally guarantee it.
- FIFTH ANNUAL GENERAL MEETING
- i* Mr. Tan Lian Huat was of the view that the loan was generating income for the Company better than placing it in the Bank and if it was secured in that

nature, there was little risk. If there was risk, he had weighed enough to guarantee it. Mr. Tan Lian Huat insisted that the loan was generating profit. He said that being a Fund Manager, if there was surplus money and it could be lent for example to Mr. Lee Sing Kuan, he would go ahead. Mr. Tan Lian Huat looked at it from the business point of view and there is a interest generating income for the Company and it was not a figure where Mr. Oh's personal guarantee was insufficient. Even the words of his mouth is enough. Mr. Tan Lian Huat confirmed that interest was paid every month on time. However, the Chairman was not satisfied as the debtor had not shown prompt repayment of the loan within 6 months period. The Chairman was concerned at the Company's position if the debtor continued to delay payment notwithstanding the guarantee. The Chairman pointed out that in the resolution there was no mention of interest at all and he raised this question as the Company was not a lending Company and a matter of principle and a matter of practice it was wrong. The Board had never discussed the loan, money was given out and put in Mr. Oh's name, when it came to the Chairman he questioned it. He quoted a Chinese idiom equivalent to putting the cart before the horse as there were a lot of other things which had to be queried particularly loan to third parties.

Lee deposed and he verily believed that on 24 October 1997 the respondent had obtained a court order to reduce its capital from RM77,500,000 to RM7,750,000. Lee too verily believed that on 25 November 1997 the petitioner had informed the respondent through a notice of transfer dated 1 November 1997 that the petitioner was desirous of selling his shares to the value of 675,000 ordinary shares to the current shareholders of the respondent who were interested in purchasing at RM4.90 per one ordinary share. In that notice of transfer, the petitioner appointed the respondent as the agent. Lee verily believed that the repondent, on 1 December 1997, had written to the shareholders about the petitioner's desire as expressed in the notice of transfer to sell the petitioner's shares at RM4.90 per share. The shareholders by the names of Peh Boon He, Low Chun San, Hong Bee Huang, Lim Yoke Hon, Lee Poo Sik (Lee, the deponent of encl. 5) and Juang Kuang (Pte) Ltd agreed to purchase the shares on 18 December 1997. Lee too verily believed that the respondent had on 2 January 1998 written to the purchasers of the shares and conveyed the message that they were supposed to pay those shares by or before 15 January 1998. To Lee's knowledge, during the directors' meeting on 13 January 1998, the chairman of the meeting by the name of Lee Sing Kuan had proposed that a committee be appointed to manage the transfer of the shares and to oversee the take over of the subsidiary companies to the credit of the respondent. The chairman of the meeting too suggested that the RM2 million loan be "off set" from the sale of the petitioner's shares and to regard that loan as a loan from the petitioner to OCS and OCM. The directors' meeting was also attended by the petitioner. Lee verily believed that all the purchasers of the shares had deposited their monies totalling RM3,307,500 with the respondent at different points of time. According to the records of the

- a* respondent, on 28 February 1998 the respondent had released part of the sale price of the shares at RM1,227,500 to the petitioner via a HBMB cheque no: 467260. On 28 February 1998 the petitioner had claimed from the respondent and/or the secretary of the respondent's company known as M/s Leta Management Service Sdn Bhd of room 503, 5th Floor, Merlin Tower, Jalan
- b* Meldrum, 80000 Johor Bahru, Johore the balance of the monies from the sale of the shares amounting to RM2,080,000. According to the records kept by the respondent, on 4 March 1998, the respondent had written to the petitioner in regard to the status of the loan which till to date had not been settled by OCS and OCM. Lee deposed that he verily believed that on 20 March 1998
- c* the petitioner through his solicitors Messrs Leng & Co of first and second floors, Wisma Great Oriental, no. 23, Jalan Meldrum, 80000 Johor Bahru, Johore had directed the secretary of the respondent's company to, *inter alia*, stop the transfer of the shares till the petitioner receive the whole of the balance of the sale of the shares from the respondent. On 19 March 1998 the
- d* petitioner's solicitors issued a notice under s. 218 of the Companies Act 1965 against the respondent on the ground that the respondent as the agent and trustee of the petitioner was responsible to release the balance of the monies from the sale of the shares to the petitioner. Lee verily believed that the respondent was not indebted to the petitioner but rather acted as stakeholder for the petitioner in the sale transaction of the petitioner's shares. Lee
- e* emphasised that the respondent held a lien to retain the balance of the monies from the sale of the shares till the petitioner settle the amount loaned to the respondent. Lee verily believed and was advised by his solicitors Messrs Lam & Lim of room 9.3, 9th floor, Menara Pelangi, 80400 Johor Bahru, Johore that the respondent, in reality, was not indebted to the petitioner. It was said
- f* that the petitioner had no valid reasons to proceed with the proceedings against the respondent by way of a notice under s. 218 of the Companies Act 1965 because the proceedings were tainted with *mala fide*, scandalous, frivolous and vexatious and an abuse of the process of the court. Lee has since directed his solicitors to file a writ of summons and a statement of claim against the
- g* petitioner in the Johor Bahru High Court *vide* case no: 22-178-1998 on 21 April 1998. In the meantime, Lee deposed that the respondent and OCS were making attempts to settle the case and for these reasons it was essential that the rights of the respondent be protected therein. Lee pleaded, categorically, that the respondent is a company with assets and properties far exceeding the amounts claimed by the petitioner and that the respondent is a solvent company and a going concern. Thus, to safeguard the interests of the respondent, the respondent prayed for an order in terms of encl. 6, prayers
- h* (1), (2) and (3) thereof.
- Not to be outwitted, the petitioner himself affirmed an affidavit in reply on
- i* 1 June 1998 which was filed the next date as seen in encl. 8 and this was in response to encl. 6.

In encl. 8, the petitioner deposed as follows:

- (1) that no statement of claim was filed by the respondent as alleged. *a*
- (2) that the petitioner was an ex-director of the respondent and until today the petitioner's name was listed as a shareholder in the respondent's company and thus it was not true when the respondent described the petitioner as an ex-shareholder of the respondent's company. *b*
- (3) the petitioner admitted that he held three shares equivalent to 0.000999983 % or 3 shares/300,005 shares in Oh Juan Hing Sesame Oil & Foodstuff Sdn Bhd. *c*
- (4) the petitioner denied that he had persuaded the respondent to loan RM2 million to OCS and OCM.
- (5) it was according to the petitioner, both OCS and OCM had persuaded Ang Chong Chong ("Ang") – the administration director of the respondent, to advance the loan of RM2 million. *d*
- (6) that OCS was a director since 15.9.81 and a shareholder (holding 10.707% shares) in a Singapore company known as Juan Kuang (Private) Limited. The latter was said to be a substantial shareholder of 22.06% in the respondent's company. *e*
- (7) that OCS was a friend known to many members of the respondent's board of directors including Ang, Pang Ah Hay, Ng Tim Sing, Lim Boh Koi, Tan Lian Hua, Lee and the petitioner himself.
- (8) to the knowledge of the petitioner, Ang knew OCS for the last 20 years. Both Ang and OCS were directors and shareholders in Juan Kuang (Private) Limited. Ang was the administration director of Juan Kuang (Private) Limited since 18 September 1970 and currently in the same capacity. Ang held 25% shares therein. *f*
- (9) to the knowledge of the petitioner OCS persuaded and contacted Ang for the loan of RM2 million because: *g*
 - (a) Ang was an old friend of OCS;
 - (b) Ang was an administration director of the respondent; and *h*
 - (c) Ang held substantial shares in the respondent's company namely 22.06% shares held indirectly through Juan Kuang (Private) Limited and 3.91% shares held directly on his own name.
- (10) in principle Ang had given his consent to advance the loan to OCS and OCM but Ang had told OCS to contact the petitioner and check *i*

- a* whether “procedurally OK” for the respondent to advance the loan of RM2 million bearing in mind that OCS was the director in Juan Kuang (Private) Limited and the latter being the shareholder in the respondent’s company.
- b* (11) after the petitioner had perused through the provisions of the Companies Act 1965, the petitioner then telephoned Ang and told Ang that there were provisions in the said Act barring the giving of the loan to OCS and OCM.
- c* (12) Ang had told the petitioner that he agreed to loan the sum of RM2 million to OCS and OCM and the petitioner was then directed by Ang to process all the relevant documents regarding the loan.
- (13) the loan to OCS and OCM were approved by the respondent’s board of directors *vide* the resolutions of the board dated 20 October 1996.
- d* (14) at the material time of the approval of the loan, the petitioner was an executive director of the respondent that was responsible for the daily affairs of the respondent.
- (15) after the loan had been approved by the respondent’s board of directors, the petitioner in view of his position had processed the loan and signed the payment vouchers and other relevant documents.
- e* (16) on the requests of OCS and OCM, the petitioner also assisted in obtaining the release of the loan to them.
- f* (17) the petitioner denied that he was connected with OCS and OCM and the petitioner stressed that seven out of eleven board of directors of the respondent’s company knew OCS and they too knew that the petitioner and Ang had long known OCS.
- g* (18) the loan advanced to OCS and OCM were made in pursuance of a commercial decision that was made by the respondent’s board of directors for the benefit of the respondent.
- (19) that the petitioner did not recommend that the loan of RM2 million to be advanced and it was OCS and OCM that persuaded Ang to provide the loan.
- h* (20) the petitioner denied guaranteeing the loan and he said that there was no reason why he should guarantee that loan. After the loan had been disbursed, this was during the yearly meeting of 1997, the petitioner did say that he was willing to act as a guarantor for the repayment of the loan in the event OCS and OCM failed to repay the loan
- i* provided both OCS and OCM made the necessary arrangements

agreeable by the petitioner. But, according to the petitioner, no steps were taken to regularise the proposal. **a**

(21) the petitioner was advised that his proposal to guarantee the repayment of the loan was not a guarantee that was enforceable and if that constituted a guarantee, the guarantee was given without consideration or it was based on a past consideration. **b**

(22) the petitioner said that the interest of 1% per month leviable on the loan of RM2 million was agreed upon by Ang but it was not the decision of the petitioner.

I pause here to take stock of the situation. The petitioner's affidavit in reply in encl. 8 was rather long and protracted. It was an exercise in patience to read that long affidavit. Enclosure 8 answered point by point encl. 5. For instance, it referred to paras. 18, 20, 21, 22, 24, 25, 26 and 28 of encl. 5 and answered them categorically. The petitioner also denied para. 31 of encl. 5. According to the petitioner the writ of summons and the statement of claim adverted to in encl. 5 of para. 32 had yet to be served on him. The petitioner deposed that the issue pertaining to the attempts at settlement between the respondent and OCS and OCM were irrelevant. The petitioner also denied para. 34 of encl. 5. Finally, the petitioner deposed that the respondent had no valid reasons in law to prevent the petitioner from proceeding with the action of winding up and for these reasons the petitioner prayed that the summons in chambers in encl. 6 be dismissed with costs and that costs to be assessed by the court which was payable by the respondent to the petitioner. **c**

I will now continue to regurgitate what the petitioner had deposed to in encl. 8. The petitioner deposed that the notice of transfer dated 25 November 1997 exhibited and marked as exh. "JK-9" in encl. 5 was in fact a notice issued by the petitioner in accordance with the terms of the agreement with the respondent's shareholders dated 8 July 1992. For brevity, that notice of transfer should be reproduced and it is now reproduced: **d**

Tan Lian Huat,
16 Jalan Rengas,
Melodies Garden,
80250 Johor Bahru.

25 November 1997 **e**

Juan Kuang Holdings Sdn Bhd,
20 Jalan Skudai Kiri,
81200 Johor Bahru.

Attn: Mr. Ang Chiong Chai - Managing Director **f**

Dear Sirs, **g**

h

i

a Transfer of Shares - Transfer Notice

I refer to the offer by Mr. Ang Chiong Chai at the informal gathering of shareholders on 16 November 1997 to acquire from any shareholders who are willing to sell their shares in the Company at the price of RM0.49 per share ex-the capital return of RM0.90 per share pursuant to the capital reduction recently approved by the High Court.

b

In response thereto, I wish to inform that I am desirous of selling my shareholdings in the Company upon the completion of the capital return of RM0.90 per existing shares and the subsequent amalgamation of the resulting shares of RM0.10 each into shares of RM1.00 each as recently approved and ordered by the High Court.

c

My existing shareholdings in the Company of 6,750,000 shares of RM1.00 will, after the aforesaid capital reduction and amalgamation, be reduced to 657,000 New Shares of RM1.00 each.

d

I hereby appoint the Company to be my agent to sell my aforesaid New Shares of RM1.00 each at the price of RM4.90 per share.

It is my intention to dispose my entire shareholdings in the Company, and unless all my shares are sold, none shall be sold in accordance with the Shareholders' Agreement dated 8 July 1992.

e

Yours faithfully,

Sgd (Illegible)
Tan Lian Huat

c.c Mr. Huan Chuan Sen - Company Secretary.

f

and of significance to note would be the petitioner's positive assertion that he would appoint the respondent to be the petitioner's agent to sell the new shares of RM1 each at the price of RM4.90 per share. This very assertion raised an interesting issue of agency of which I have more to say in the later part of this judgment.

g

The petitioner further deposed that the agreement with the respondent's shareholders were signed by all the respondent's shareholders and all of them agreed that the sale of the respondent's shares must religiously follow the provisions as provided therein. It was deposed that all the shares in the respondent's company were processed in accordance with the terms of the agreement dated 8 July 1992. The petitioner deposed that he did not appoint the respondent as a "stakeholder", rather according to the petitioner the notice of the transfer by the petitioner showed that the respondent was appointed as an "agent" to sell the petitioner's shares in the respondent's company.

i

In regard to paras. 20, 21 and 22 of encl. 5, the petitioner responded in this manner. He said that he together with 24 other shareholders of the respondent

offered en bloc to the other shareholders of the respondent to sell their shares with the respondent's company at the price of RM4.90 per share. The total shares of these 25 potential sellers came up to 3,332,716 which constituted 43% of the paid up capital of the respondent. After receiving the notice of transfers of the 25 potential sellers and the corresponding acceptance by the existing shareholders of the respondent's company, the respondent proceeded to act accordingly. In regard to para. 31 of encl. 5, the petitioner categorically stated that he did not agree that the loan of RM2 million was to be deducted from the sale of the petitioner's shares. The petitioner too averred that he did not agree to be a guarantor for the loan of RM2 million. In so far as paras. 24 and 25 of encl. 5 were concerned, the petitioner had this to say:

- (1) the petitioner's shares with the respondent's company were sold together with the shares of the other 24 shareholders of the respondent's company and the shares of these 25 people were purchased by 19 other existing shareholders of the respondent's company.
- (2) after the respondent received the purchase price for these sale transactions, the respondent kept the monies in fixed deposits and the respondent merely issued cheques and transmitted them to the secretary of the respondent on 26 February 1998.

Responding to paras. 26 and 28 of encl. 5, the petitioner had this to say:

- (1) it was agreed between the sellers and the buyers of those shares that the transfers of those shares can only be effected after the sellers had been paid in full.
- (2) since the petitioner had not received payment in full for the sale of those shares, the petitioner had given notice and directed his solicitors to give notice to the respondent and the respondent's secretary to the effect that efforts to transfer those shares should not be proceeded with until after the petitioner had received the balance of the purchase price of those shares.
- (3) the petitioner had deposited all the share certificates and the transfer forms for those shares at the office of the secretary of the respondent and the petitioner was duly informed by the secretary to the respondent that the transfer forms for those shares had been stamped. Two letters were exhibited and marked as "F" in encl. 8 and these two letters emanated from Messrs Lam & Lim dated 20 April 1998 and the reply thereto by Messrs Leng & Co dated 6 May 1998. I will reproduce these two letters hereunder. The letter from Messrs Lam & Lim was worded thus:

a

LAM & LIM
Advocates & Solicitors/
Peguambela & Peguamcara
Commissioner for Oaths/
Pesuruhjaya Sumpah

b

Date: April 20, 1998

TAN LIAN HUAT,
No. 16, Jalan Rengas,
Taman Melodies,
80250 Johor Bahru,
Johor Darul Ta'zim.

c

A.R. REGISTERED
CERTIFICATE OF POSTING

Sir,

d

**RE: OUTSTANDING CLAIM FOR RM2,000,000.00
DUE AND PAYABLE TO M/S JUAN KUANG
HOLDINGS SDN. BHD.**

We act for M/S JUAN KUANG HOLDINGS SDN. BHD. of Room 503,
5th Floor, Merlin Tower, Jalan Meldrum, 80000 Johor Bahru, Johor
Darul Ta'zim in respect to the above matter.

e

We are instructed to state that our client has granted a friendly loan of
RM2,000,000.00 at your recommendation to Mr. Oh Chin San and Mr.
Oh Cheng Meng subject to the terms and conditions as stated in the
Acknowledgement and Confirmation of Debt made between them and
our client dated 1st day of November, 1996 whereby they had agreed
to repay upon the expiry of six (6) months from the date thereof that
is by the 30th day of April 1997 particulars of which you are fully aware
of.

f

We are further instructed to state that you had on 27th July 1997 at
our client's Annual General Meeting and several other occasions
undertook and guaranteed to repay the said amount of RM2,000,000.00
to our client in the event that the said Mr. Oh Chin San and Oh Cheng
Meng failed to do so.

g

We are further instructed that the said Mr. Oh Chin San and Mr. Oh
Cheng Meng have failed to pay the said sum of RM2,000,000.00 within
the time stipulated and that despite repeated reminders from our client
you still failed, refused and/or neglected to pay up the same.

h

TAKE NOTICE that we are now instructed by our client to DEMAND
from you which we hereby do that you pay the said sum of
RM2,000,000.00 together with our fees of RM78.75 for the issuance of
this Notice to our client or to us as solicitors for our client WITHIN 7

i

(SEVEN) DAYS FROM THE DATE HEREOF; failing which we have our client's firm instructions to commence legal proceedings against you including Bankruptcy without further reference in such an event all costs and expenses incurred therein shall be borne by you.

a

Yours faithfully,
FOR LAM & LIM
Sgd (Illegible)

b

.....
LOO WEI KHENG

c.c. M/S JUAN KUANG HOLDINGS SDN. BHD.
Room 503, 5th Floor, Merlin Tower,
Jalan Meldrum, 80000 Johor Bahru,
Johor Darul Ta'zim.

c

And the letter from Messrs. Leng & Co was couched in this fashion:

LENG & CO.
ADVOCATES & SOLICITORS
PEGUAMBELA DAN PEGUAMCARA

d

6 May 1998
M/s Lam & Lim,
Advocates & Solicitors,
Johor Bahru.

e

Dear Sirs,

**Re: Purported claim of RM2,000,000.00
due and payable to Juan Kuang Holdings
Sdn. Bhd.**

f

1. We act for Mr. Tan Lian Huat and refer to your letter of 20.4.1998, a copy of which had been handed to us with instruction to reply thereto.
2. We are instructed that our client had neither recommended your client to grant the loan of RM2 million to Mr. Oh Chin San and Mr. Oh Cheng Meng nor at any time agreed to undertake or guarantee the repayment of the aforesaid loan to your client.
3. Our client therefore categorically denies being liable for the said sum of RM2 million or any part thereof.
4. Take notice that our client shall hold your client fully responsible for all costs and expenses incurred and all losses and damages suffered should your client proceed with any legal action.
5. Meanwhile, we return herewith for your attention your following 4 sealed envelopes all of which had been sent to our client's residence:

g

h

i

- a* (a) The envelope containing letter addressed to Oh Cheng Meng sent by Certificate of Posting.
- (b) The envelope containing letter addressed to Oh Cheng Meng sent by A.R. Registered post together with the A.R. Card stapled thereto.
- b* (c) The envelope containing letter addressed to Oh Chin San sent by Certificate of Posting.
- (d) The envelope containing letter addressed to Oh Chin San sent by A.R. Registered post together with the A.R. Card stapled thereto.
- c* 6. We are instructed to notify you, which we hereby do, that both Mr. Oh Cheng Meng and Mr. Oh Chin San had never stayed at our client's residence and our client has never agreed to allow his address (to) be used by Mr. Oh Cheng Meng and Mr. Oh Chin San as the address for service.
- d* Yours faithfully,
- Sgd (Illegible)
- Encls.
- c.c. client
- e* These two letters showed that the parties were at loggerheads and did not see eye to eye. The petitioner was adamant and denied that he was the guarantor for the loan of RM2 million and he too denied that he had told the respondent about his role as a guarantor. The petitioner too deposed in encl. 8 that the stand of the respondent to the effect that the respondent was a "stakeholder"
- f* for the petitioner in regard to the sale of the shares was nothing more than mere afterthoughts. The petitioner challenged the respondent's claim that the respondent held a "lien" to retain the balance of the monies arising from the sale of those shares until the full payment of the loan of RM2 million was paid. The petitioner too took exception to the averments that the respondent had assets, solvent and a going concern.
- g* The affidavits in encls. 5 and 8 gave rise to interesting issues and I will now endeavour to examine them not in its order of merit.
- Set-Off Between The Principal And The Agent***
- h* It was the respondent's stand that the RM2 million loan was to be "off-set" with the proceeds of sale of the petitioner's shares. The respondent too held steadfastly to the belief that the respondent was the agent of the petitioner. The petitioner seemed to agree that the respondent was appointed as an agent to sell the petitioner's shares in the respondent's company. This makes the
- i* petitioner to be a principal in his relationship with the respondent. But the petitioner disagreed that the loan of RM2 million was to be deducted from

the sale of the petitioner's shares. "Set-off" or "off-set" is a difficult branch of the law. A contractual set-off arises where a right to set-off is usually created by contract between the claimants in circumstances where set-off would otherwise not be available. It must be borne in mind that the set-off springs from the contract and not from the fact that the claims between the parties are transactional. To me a set-off is a shield which operates as a defence to the plaintiff's action, whereas a counterclaim is a sword with which the plaintiff may be attacked but it does not provide nor afford the defendant any protection unless it is of such a nature that it can also be pleaded as a set-off. It is germane to mention that the courts of equity would give effect to a "set-off" independently of any statutory intervention. The court would thus be willing to grant an injunction in order to prevent the plaintiff from pursuing claims without any cross-claims being taken into account (*Rawson v. Samuel* [1839] 1 Cr & Ph 161). At the local scene, there is O. 15 r. 2 of the Rules of the High Court 1980 ("RHC") which states as follows:

- (1) Subject to rule 5 (2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (when-ever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.
- (2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.
- (3) A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed.
- (4) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the Court's discretion with respect to costs.

and which allows the defendant to counterclaim against the plaintiff. That counterclaim may either be for liquidated or unliquidated damages and it may even exceed the amount of the plaintiff's claim or be less than the claim as advanced by the plaintiff. Thus, if the defendant has a valid cause of action under the writ as issued by the plaintiff the defendant need not bring a separate cause of action but rather to proceed under the writ and counterclaim thereunder (*Beddall v. Maitland* [1881] 17 Ch D 174, 187).

In the context of the present case, the respondent has filed a civil suit no: 22-170-1998 on 21 April 1998 in the Johor Bahru High Court and that civil suit cited the petitioner as the defendant (see exh. "JK-19" of encl. 5).

- a* Prayer 31 (c) of the statement of claim in civil suit no: 22-170-1998 sought for a declaration that the respondent as “stakeholder” was entitled to retain the balance of the money from the sale of the shares amounting to RM2,080,000 in a fixed deposit until OCS and OCM and/or the petitioner as a guarantor return the money to the respondent. In other words, the respondent
- b* converted the counterclaim or set-off as one of the prayers in that civil suit which was perfectly in order. Section 170 of the Contracts Act 1950 enacts as follows:

170. Agent’s right of retainer out of sums received on principal’s account.

- c* An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

- d* and clearly the right conferred by this section is in the nature of a retainer and it assumes the agent to have the money for which he is accountable to the principal. Section 171 of the Contracts Act 1950 further enacts that subject to the deductions specified in s. 170, the agent is bound to pay to his principal all sums received on his account. It is a correct assertion to say that for an agent to receive money he has generally no authority to receive anything else
- e* as a equivalent. As between the principal and a third-party, a set-off or balance of accounts between the third party and the agent in his own right is not a good payment to the agent on behalf of the principal. The case of *Pearson v. Scott* [1878] 9 Ch D 102 at p. 108 lays down the principle that the debtor “must pay in such a manner as to facilitate the agent in transmitting the money to his principal.”
- f*

This brings me to next issue canvassed in the affidavits of the parties. It is on the question of a stakeholder.

Stakeholder

- g* It must be recalled that the respondent’s stand was that the respondent was not indebted to the petitioner but rather acted in the capacity of a stakeholder for the petitioner in the sale transaction of the petitioner’s shares. The petitioner, on the other side of the fence, held onto the notion that he did not appoint the respondent as a stakeholder. What is the meaning of a stakeholder?
- h* It is said that a stakeholder is one who has received money for the express purpose of holding it until it has been ascertained who is entitled to it. Once the stakeholder is identified, he is in law liable in action for money had and received if the stakeholder wrongfully parts with the money (*Cowling v. Beachum* [1823] 7 Moore CP 465 and *Sadler v. Smith* [1869] LR 5 QB 40, Ex Ch.). In a similar vein, a person to whom money has been entrusted to him for a specific purpose is liable if he fails to apply the money as directed
- i*

or if he fails miserably to account for its whereabouts (*Barry v. Roberts* [1835] 1 Har & W 242; *Re Strachan, ex parte Cooke* [1876] 4 Ch D 123 CA; *Hancock v. Smith* [1889] 41 Ch D 456, CA; *Re Wreford, Carmichael v. Rudkin* [1897] 13 TLR 153; *Brenes & Co v. Downie* [1914] SC 97; and *Re Parker, ex parte Froggatt* [1843] 3 Mont D & De G 322). **a**

As I said in the context of the present case, the statement of claim in civil suit no: 22-170-1998 categorically raised the issue of stakeholdership and, I tend to agree with Miss Loo Wei Kheng for the respondent that until the civil suit was heard and disposed of, the petitioner should be restrained from taking the necessary measures to wind-up the respondent. **b**

Guaranteee **c**

According to the respondent, the petitioner gave an undertaking and guaranteed to repay the RM2 million loan to the respondent. The petitioner in encl. 8 vehemently denied that he stood as guarantor for that loan amount. In plain language a guarantee is nothing more than a promise to answer for the debt of another. Section 79 of the Contracts Act 1950 defines a guarantee as a “contract to perform the promise, or discharge the liability, of a third person in case of his default.” Simply put a guarantee is a promise by one person known as “surety” or “guarantor” to answer for the default of another who in local parlance is referred to as the “principal debtor”. A guarantee too is described as a promise by one person to perform a promise to a third person and that third person is referred to as the “creditor.” **d**

A guarantee document must be liberally and reasonably construed. This seems to be the view of Mohamed Dzaiddin SCJ (now FCJ) in *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 1 AMR 1:1 where at p. 8 his Lordship remarked succinctly: **e**

In construing the words of the guarantee, in our view, the learned Judge should have adopted a liberal approach by giving a reasonable construction to them, having regard to the surrounding circumstances. **f**

The respondent by letter dated 4 March 1998 wrote to the petitioner and adverted to the petitioner’s undertaking and guaranteeing the collection of RM2 million. That letter was worded thus: **g**

A.R. REGISTER **h**

Date : 4th MARCH, 1998

MR. TAN LIAN HUAT,
16, JALAN RENGAS,
MELODIES GARDEN,
80250 JOHOR BAHRU,
JOHOR. **i**

a DEAR SIRS.

**RE: RM2 MILLION OUTSTANDING DEBT TO
MR. OH CHIN SAN AND MR. OH CHENG MENG**

b With reference to the above, please be advised that the outstanding debt of RM2 MILLION that (was) arranged by you to the above-mentioned party had since expired on 1ST APRIL, 97 (SIX MONTHS FROM 1ST NOVEMBER, 1996).

c You have during several occasion(s) of (the)board meetings and shareholders meeting agreed to undertake and guarantee the collection of the amount of RM2 MILLION.

Please inform the board for further development within seven (7) days.

Yours faithfully,

JUAN KUANG HOLDINGS SDN. BHD.

d Sgd (Illegible)
.....
Director

e It must be recalled that at the fifth AGM of the respondent's company on 27 July 1997 the petitioner categorically gave an undertaking and guaranteed the repayment of the RM2 million loan. This was a man who reneged on his own words to save his own skin. As a surety or as a guarantor the petitioner's liability arises upon default of the principal debtors in the persons of OCS and OCM. In *Moschi v. Lep Air Services Ltd And Others* [1972] 2 WLR 1175 (Lord Reid, Lord Gardiner, Lord Diplock, Lord Simon of Glaisdale and Lord Kilbrandon), Lord Reid writing a separate judgment spoke of two kinds of undertakings by a guarantor. In clear language, Lord Reid said at p. 1179 to p. 1180 of the report:

g With regard to making good to the creditor payments of instalments by the principal debtor there are at least two possible forms of agreement. A person might undertake no more than that if the principal debtor fails to pay any instalment he will pay it. That would be a conditional agreement. There would be no prestable obligation unless and until the debtor failed to pay. There would then on the debtor's failure arise an obligation to pay. If for any reason the debtor ceased to have any obligation to pay the instalment on the due date then he could not fail to pay on that date. The condition attached to the undertaking would never be purified and the subsidiary obligation would never arise.

h On the other hand, the guarantor's obligation might be of a different kind. He might undertake that the principal debtor will carry out his contract. Then if at any time and for any reason the principal debtor acts or fails to act as required by his contract, he not only breaks his own contract but he also puts

i

the guarantor in breach of his contract of guarantee. Then the creditor can sue the guarantor, not for the unpaid instalment but for damages. His contract being that the principal debtor would carry out the principal contract, the damages payable by the guarantor must be the loss suffered by the creditor due to the principal debtor having failed to do what the guarantor undertook that he would do.

a

It is the duty of the court to construe the meaning behind the guarantee. It is an onerous duty and according to Hashim Yeop A Sani SCJ in *Osman bin Abdul Ghani & Ors v. United Asian Bank Bhd* [1987] 1 MLJ 27, a guarantee “must be construed reasonably having regard to the surrounding circumstances” (see p. 34 of the report), while Seah SCJ in a dissenting judgment remarked at p. 32 that “a guarantee must be construed not only by the words used but also with regard to the surrounding circumstances.” In *Miles v. New Zealand Alford Estate Company* [1886] 32 Ch D 266, Bowen LJ succinctly said:

b

c

We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men.

d

It is too premature at this juncture, to adjudicate on those documents alluded to in the affidavits and in this judgment to ascertain the pith and substance of the guarantee. The right forum would be during the trial of civil suit no: 22-170-1998.

e

The Notice Under S. 218 of the Companies Act 1965

From encl. 5, it can be discerned that the petitioner’s solicitors issued a statutory notice on 19 March 1998 under s. 218 of the Companies Act 1965 against the respondent. The latter reacted and through its solicitors sent a reply dated 14 April 1998.

f

That reply has been exhibited and marked as exh. “G” in encl. 8 and it was worded thus:

LAM & LIM
Advocates & Solicitors/Peguambela & Peguamcara
Commissioner for Oaths/Pesuruhjaya Sumpah

g

Date : 14/4/98

M/s Leng & Co,
Advocates & Solicitors,
1st and 2nd Floor,
Wisma Oriental,
23, Jalan Meldrum,
80000 Johor Bahru.

h

BY FAX/HAND

Dear Sirs,

i

**a RE: STATUTORY NOTICE PURSUANT TO SECTION 218 OF THE
COMPANIES ACT, 1965 ON JUAN KUANG HOLDINGS SDN. BHD.**

We act on behalf of our client Juan Kuang Holdings Sdn Bhd.

b We refer to your purported statutory notice pursuant to Section 218 of the Companies Act, 1965 dated 19th March 1998 on behalf of your client Tan Lian Huat.

c We are instructed to inform you that our client is deeming your notice as invalid and bad in law as our client is merely a stakeholder for both the Vendor Tan Lian Huat and the purchasers of his 675,000 shares in our client's company.

Our client is neither liable for the purchase price for the shares nor is a debtor of your client for the purposes of your statutory notice. Our client is also a stakeholder of the share certificates and transfer forms of your client or the purchase price of the respective purchasers.

d Further, by virtue of your letter to the company secretary dated 20 March 1988 (typo error – 1998) your client has instructed our client's Company Secretary not to proceed with the transfer of the Sale shares thereby discharging and terminating our client from its appointment as agent in respect of the sale of the Sale shares.

e Your client's Transfer Notice dated 25 November 1997 is thus deemed cancelled. The company secretary as such shall be returning the transfer forms and share certificates to your client accordingly.

f TAKE NOTICE that should your client proceed with winding-up action or other proceedings against our client, our client shall hold your client liable for all losses, damages and costs as a consequence thereof including but not limited to loss of reputation, loss of business and inconvenience.

Yours faithfully,

Sgd (Illegible)

g Clearly from exh. "G" in encl. 8, the stand of the respondent was made very clear. The respondent was merely a stakeholder for the petitioner and the rest of the purchasers of the petitioner's 675,000 shares in the respondent's company. The respondent too made it clear that they were not a debtor to the petitioner but rather a stakeholder of the share certificates and the transfer forms of the petitioner or a stakeholder to the purchase price of the respective purchasers of the petitioner's shares. The respondent did not mince words and made it patently clear that in the event the petitioner proceeded with the winding-up action or proceed with other proceedings against the respondent, the respondent would hold the petitioner liable for all losses, damages and costs; and these consequences according to the respondent would not be limited to loss of reputation, loss of business and inconvenience. All along the

h

i

respondent held the petitioner to be the guarantor who gave the undertaking to guarantee the loan of RM2 million to OCS and OCM. In my judgment, I hold that the respondent had succeeded in establishing that the debt was disputed on substantial grounds. In *System Communication Engineering Sdn Bhd v. Zabidin Sdn Bhd* [1999] 1 AMR 1187 at p. 1202 to p. 1203, I had occasion to say the following which must surely apply to the respondent:

The respondent made a valiant attempt to show bona fide disputes. Issues were raised in an attempt to show bona fide disputes but sadly non existed. I am aware that a petition for enforcing a disputed debt is an abuse of the process of the court and it will be dismissed with costs (*Re Ban Hong Co Ltd* [1959] MLJ 100 and *Re Merchandise Construction Pte Ltd* [1989] 3 MLJ 9, 12). I too am aware that if there is a bona fide dispute about the debt or a substantial counterclaim, the court may stay the petition pending the resolution of the dispute (*Ng Tai Tuan v. Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338). I am also acutely aware that where a debt is disputed on a substantial ground, the creditor has no locus standi whatsoever to petition for winding-up even if the company is insolvent (*Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49; and *Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd* [1990] 1 MLJ 372). Of course, when the dispute in regard to the debt is a subject matter of an arbitration, then the winding-up petition should be struck out (*Liew Yin Yin Construction Sdn Bhd* [1989] 3 MLJ 249). All these propositions of the law cannot be applied to the factual matrix of the present case. The respondent here failed to show a bona fide dispute (*Campana Distributor Sdn Bhd v. Amseal Engineering (M) Sdn Bhd* [1998] 2 AMR 1330). In *Chang Chan Thong t/a Express Aluminium Works & Trading Co v. Kemajuan Sri Segara Sdn Bhd (formerly known as Pembinaan Sri-Segara Sdn Bhd)* [1996] 2 CLJ 471, the respondent managed to raise a dispute in the course of business trading. All along the respondent in that case had protested against the quality of the product that had been supplied to the point when the statutory notice under section 218(2)(a) of the Companies Act, 1965 was served on the respondent. The respondent in that case wrote to the petitioner's counsel and explained why they can't settle the account and in that situation the court refused the winding-up petition as the respondent's conduct showed that there was a genuine dispute from the outset.

and, consequently, I had no hesitation in allowing encl. 6, prayers (1) and (2) thereof.

Agency And Agent's Lien On Principal's Property

The respondent was the petitioner's agent to sell the shares at RM4.90 per share. This was the petitioner's positive assertion in encl. 8. An agent is defined under s. 135 of the Contracts Act 1950 as a person employed to do any act for another or to represent another in dealings with third persons. Section 138 of the Contracts Act 1950 enacts that no consideration is necessary to create an agency. Section 174 of the Contracts Act 1950 enacts as follows:

a 174. Agent's lien on principal's property.

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.

b

Of pertinence, would be this nagging question: Whether money transferred to an agent in connection with his agency function is his absolutely subject to the duty to pay it to his principal or it is held on "express" trust? The answer to this crucial question would be dependent on the contract between the principal and the agent. It is trite law that the existence of a contractual relationship of debtor and creditor between the parties does not prevent the existence of a simultaneous trust relationship or a fiduciary relationship involving the money which is held on trust (*Re Kayford* [1975] 1 WLR 279; *Carreras Rothmans Ltd v. Freeman Matthews Treasure Ltd* [1985] Ch 207; and *General Communications Ltd v. Development Finance Corp. of New Zealand* [1990] 3 NZLR 406). Sometimes by looking at the contract between the principal and the agent, the intention to create a trust may be inferred and everything turns on the interpretation to be placed by the court in regard to the intentions of the parties, according of course to the general principles. It is the *prima facie* duty of an agent to keep the principal's money and, I may add, property separately (*Westpac Banking Corp v. Savin* [1985] 2 NZLR 41, 49; and *Palette Shoes Pty Ltd v. Krohn* [1937] 58 CLR 1, 30). My research shows that a trust has been held to exist in two broad categories:

c

e

f

g

h

(1) where the money or property has been specifically entrusted to an agent by the principal to hold for his benefit or to use for a specific purpose (*Burdick v. Garrick* [1870] LR 5 Ch App 233; *Flitcroft's case* [1882] 21 Ch D 519; *Dooby v. Watson* [1888] 39 Ch D 178; *North American Land and Timber Co. Ltd v. Watkins* [1904] 2 Ch 233; and *Potters (A Firm) v. Loppert* [1973] Ch 399).

(2) where money or property has been handed to the agent by a third party specifically to hold or to convert into a specific property for the benefit of the principal (*Littlewood v. Williams* [1815] 6 Taunt 277; *Mathew v. Brise* [1851] 14 Beav. 341; *ex parte Dale & Co* [1879] 11 Ch D 772; and *Brown v. IRC* [1965] AC 244).

i

The courts are always on the move. Very innovative and forward looking. The present trend seems to be more liberal. It is to approach the matter more functionally and to ask whether the trust relationship is appropriate to the commercial relationship in which the parties find themselves in (*New Zealand and Australian Land Co v. Watson* [1881] 7 QB 374, 382). One must also look and ascertain as to whether money or property was received in pursuance

of a single transaction for which the agent was appointed or whether it is part and parcel of a group of transactions in respect of which there is a need to render a general account later or periodically (*Kirkham v. Peel* [1880] 43 LT 171, 172 which was affirmed *vide* [1881] 44 LT 195; *Re Arthur Wheeler & Co* [1933] 102 LJ Ch 341 and *Walker v. Corboy* [1990] 9 NSWLR 382). These are general principles of agency which will be considered by this court at the opportune time. That would be at the trial of civil suit no: 22-170-1998.

In regard to an agent's lien or a possessory lien, it merely involves the right to retain (*Hammonds v. Barclay* [1802] 2 East 227, 235). It does not and cannot involve the right to sell the goods except in special circumstances (*Smart v. Sandars* [1848] 5 CB 895). It must be emphasised, that within a narrow scope, liens are given by law only but it can also arise by contract (*Gladstone v. Birley* [1817] 2 Mer 401, 404). It is said that general liens are "founded in custom only, and are therefore to be taken strictly" (*Houghton v. Matthews* [1803] 3 B 7 P 485, 494; *Rushforth v. Hadfield* [1805] 6 East 519, [1806] 7 East 224; and *Bock v. Gorrisen* [1860] 2 De GF & J 434, 443). All the authorities show that an agent is entitled to a lien over the property of his principal in respect of payments, liabilities in relation to the matters connected with the money or property (*Woodworth v. Conroy* [1976] QB 884, 890; *R v. South Devon Ry Co* [1850] 15 QB 1043; *Ridgway v. Ley* [1856] 25 LJ Ch 584 and *Fraser v. Equitorial Shipping Co Ltd (The Ijaola)* [1977] 1 Lloyd's Rep 103). In the context of a lien over money, it is always seen with reference to the agent's right to set-off and counterclaim when that agent is being sued by the principal for the money and this is exactly what the respondent was endeavouring to project themselves in the affidavits and the statement of claim adverted to earlier. It would be ideal to read the case of *Halesowen Presswork and Assemblies Ltd v. Westminster Bank Ltd* [1971] 1 QB 1, 33-34, 46; and the decision was reversed by the House of Lords on another point [1972] AC 785, and the judgments of Viscount Dilhorne at p. 802 and of Lord Cross at p. 810 are worth reading – very thought provoking. All these would come into play during the trial proper.

Conclusion

For the reasons adumbrated above, prayers (1) and (2) of encl. 6 were allowed.

Addendum: Encl. 2

I had occasion to strike out the petition in encl. 2 with costs as I was told that the petitioner had received a cheque for the sum of RM2.08 million. The petitioner was too elated and implored this court to withdraw the petition in encl. 2 with costs. This was acceded to forthwith.

a
b
c
d
e
f
g
h
i